IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO.: 1:15-CR-445
Plaintiff,	)	JUDGE CHRISTOPHER A. BOYKO
v.	)	
TAMELA M. LEE,	)	GOVERNMENT'S TRIAL BRIEF
Defendant.	)	

Now comes the United States of America, by and through counsel, Carole S. Rendon, Acting United States Attorney, and Linda H. Barr and Adam Hollingsworth, Assistant United States Attorneys, and submits the following Trial Brief.

I. LIMITATION ON DEFENDANT SEEKING TO ADMIT HER OWN OUT-OF-COURT STATEMENTS

During the course of the public corruption investigation of Defendant Tamela M. Lee and Co-Defendant Omar Abdelqader, two Title III wiretaps were authorized for their telephone conversations. In addition, Defendant Lee was recorded in a public space attempting to influence judicial proceedings. Many of these oral recordings will be used as evidence at trial by the United States.

Out-of-court statements made by a party-opponent are excluded from the definition of hearsay under Federal Rule of Evidence 801(d)(2), but this exception does not apply when the same statements are offered by the party herself. The party-opponent exception reflects the fact that the adversarial process allows the party-declarant to rebut his or her own admissions by testifying at trial. See United States v. McDaniel, 398 F.3d 540, 545 (6th Cir. 2005). This exception does not, however, extend to a party's attempt to introduce his or her own statements through the testimony of other witnesses. See United States v. Payne, 437 F.3d 540, 547-48 (6th Cir. 2006). Precluding a defendant from eliciting inadmissible hearsay statements does not violate the Confrontation Clause. See United States v. Ford, 761 F.3d 641 (6th Cir. 2014).

Therefore, the Government respectfully requests that the Court prohibit defendant from introducing any of her out-of-court statements at trial through any witness other than herself.

II. ADMISSION OF OUT-OF-COURT COCONSPIRATOR STATEMENTS

As with Defendant Lee's own statements, her coconspirator's out-of-court statements are, when offered by the Government, not hearsay. See Fed. R. Evid. 801(d)(2)(E). The Government intends to offer the wiretap calls and other recordings as coconspirator statements under this Rule. In particular, the Government will offer recordings of codefendant Omar Abdelqader, who has recently pleaded guilty to conspiring with Defendant Lee, and other members of the conspiracy with whom Abdelqader discussed plans for influencing Lee's acts. A statement falls within the Rule 801(d)(2)(E) coconspirator exclusion if the Government shows "(1) that a conspiracy existed, (2) that [Lee] was a member of the conspiracy and, (3) that the hearsay statement was made in the course and in furtherance of the conspiracy." See United States v. Wright, 343 F.3d 849, 866 (6th Cir. 2003) (citation omitted); United States v. Benson, 591 F.3d 491, 502 (6th Cir. 2010) (same).

The Court determines whether the Government has proved these facts by a preponderance of the evidence under Federal Rule of Evidence 104(a). See United States v. Tocco, 200 F.3d 401, 420 (6th Cir. 2000). Accordingly, the Court "may consider hearsay" and other non-privileged evidence that would otherwise be inadmissible. Bourjaily v. United States, 483 U.S. 171, 178 (1987). The Court may even consider the "statements sought to be admitted" under Rule 801(d)(2)(E), *id.* at 181, though the Government must provide "sufficient independent and corroborating evidence" of the conspiracy, United States v. Smith, 320 F.3d 647, 654 (6th Cir. 2003). There is no set procedure for ruling on the admissibility of the statements, but courts in this Circuit commonly "admit the hearsay statements subject to a later ruling that the government has met its burden." See id.

The conspiracy's existence and Lee's membership is well documented. The evidence will show that Lee conspired with Abdelqader and others to commit mail and wire fraud, accepting bribes for official acts and depriving Summit County of Lee's honest services. Indeed, Abdelqader has already admitted his participation in the conspiracy with Lee when he plead guilty to the conspiracy charges in the indictment. In addition to the voluminous recorded statements by Abdelqader to Lee and others that he would provide Lee with money in exchange for official acts, Lee's own non-hearsay recorded admissions corroborate the conspiracy. Further, Lee's bank records confirm that she deposited matching amounts of cash after bribes were paid. Surveillance footage and photos will also show the two meeting for the payment of bribes and to discuss the manner in which Lee would use her position for Abdelqader's benefit.

The evidence will also show that the statements were "made in the course and in furtherance of the conspiracy." See Wright, 343 F.3d at 866. The conspiracy was ongoing throughout the period of the wiretap and other surveillance, from June 1, 2014 to September 9,

2014. Lee and Abdelqader continued conspiring even after the FBI confronted them. These statements were also "in furtherance of the conspiracy" under Rule 801(d)(2)(E). Such statements "can take many forms," including efforts to conceal a scheme or statements or statements "not 'exclusively, or even primarily, made to further the conspiracy.'" United States v. Tocco, 200 F.3d 401, 419 (6th Cir. 2000) (citation omitted). Moreover, the rule applies with equal force to conversations between a coconspirator and a third party. United States v. Westmoreland, 312 F.3d 302, 309-10 (7th Cir. 2002). The recordings of Abdelqader's conversations with Lee and others concern, among other things, his requests to Lee and discussions of the form and timing of her official acts, his discussions with his associates seeking to use his influence to obtain Lee's intervention, and his coordination of efforts to obtain money to give to Lee.

Nor do these coconspirator recordings implicate any Confrontation Clause concerns because these recorded statements are not testimonial in nature. Rule 801(d)(2)(E) coconspirator statements are "categorically non-testimonial and also within a 'firmly rooted' exception to the hearsay rule. Therefore, the Confrontation Clause does not bar their admission." United States v. Tragas, 727 F.3d 610, 615 (6th Cir. 2013) (internal citations omitted).

Finally, many of these statements are not hearsay because they will be offered not for the truth of the matter asserted, but to show Defendant Lee's and her coconspirators' knowledge, intent, or state of mind. Accordingly, to the extent coconspirator statements are offered for the truth of any matter asserted, the Government submits that the Court should admit recordings of Codefendant Abdelqader pursuant to Rule 801(d)(2)(E).

III. EXCLUSION OF LAWFULNESS AND NON-CORRUPT CONDUCT EVIDENCE

The Government respectfully moves the Court to exclude all evidence of Defendant Lee's lawfulness and non-corrupt conduct, except for reputation or opinion evidence offered by character witnesses strictly in accord with the limitations of Federal Rule of Evidence 405(a). Evidence of a defendant's "good acts" is sometimes referred to as "reverse 404(b) evidence" and is inadmissible.

A. GOOD ACTS EVIDENCE IS IRRELEVANT AND INADMISSIBLE

Federal Rules of Evidence 404(a) permits the limited use of character evidence in defined circumstances. Rule 404(a)(1) renders admissible "evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." Although Rule 404(a) does not define "character trait," the term has traditionally "refer[red] to elements of one's disposition, 'such as honesty, temperance, or peacefulness.'" See United States v. West, 670 F.2d 675, 682 (7th Cir. 1982). In this case, certain character traits may or may not be pertinent.

B. DEFENDANT'S METHODS FOR PROVING CHARACTER

Should Defendant Lee establish a basis for the admission of character evidence, Federal Rule of Evidence 405(a) governs the manner in which character may be proved. Generally, evidence of a defendant's character must be presented in the form of opinion or reputation testimony. Often, a defendant seeks to establish his innocence of the charged offenses through proof of the absence of criminal acts on other specific occasions. Such an attempt to prove character through specific acts is impermissible. See United States v. Scarpa, 897 F.2d 63 (2d Cir. 1990). See United States v. Daulton, 266 F. App'x 381 (6th Cir. 2008) (citations and internal quotations omitted) ("Evidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant."); United States v. Camejo, 929 F.2d 610, 613 (11th Cir. 1991) ("Evidence of good conduct is not admissible to negate criminal intent.").

In United States v. Hill, the defendant attempted to offer evidence of her failure to steal three test letters to prove that she did not embezzle the items charged in the indictment. 40 F.3d 164, 169 (7th Cir. 1994). In affirming the trial court's exclusion of such evidence, the Seventh

Circuit noted that the defendant "offers no authority for her argument that law-abidingness is a pertinent character trait for the crimes with which she was charged." Id. at 169. The court continued, "[a]ssuming law-abidingness was a pertinent character trait, however, the proper method of proof would have been by reputation or opinion testimony." Id.

Often in an effort to distract the jury from the charges for which a defendant stands trial, defendant may seek to elicit evidence that on prior occasions, defendant committed good acts, such as properly doing his job. Sometimes such evidence is affirmatively offered, but often defendant presents the evidence in the form of questions posed on cross-examination, such as, "Isn't it true that defendant did not do anything improper on this occasion?" or "Isn't it true defendant always treated you with respect?" or "Isn't it true that defendant was a hard worker?" Only when character "is an essential element of a charge, claim or defense" may the defendant introduce specific instances of conduct. See Fed. R. Evid. 405(b).

Any evidence of this sort is inadmissible and should be excluded. To the extent Defendant Lee offers character evidence, she should be permitted to do so only in accordance with the limitations of Federal Rule of Evidence 405(a), which permits opinion or reputation testimony, not specific acts of good conduct.

In order to avoid surprise and possible error, it would be proper for the Court to require that the defense disclose any such evidence or argument in advance, in order to provide the Government an opportunity to object. United States v. Shields, 1991 WL 236492 at *2 (N.D. Ill. 1991). Absent such notice, Defendant Lee should be barred from referring to specific "good acts" in opening statements.

The case of United States v. Kemp illustrates complications that could arise absent such notice. 362 F. Supp. 2d 591 (E.D. Penn. 2005). In that case, defendant did not seek a pretrial ruling regarding the intent to offer certain evidence, including evidence of "consciousness of innocence" and evidence that certain unspecified improper motives had influenced the government. Id. at 593. The defense raised these purported defenses in the opening statement, after which the government moved in limine to preclude the defenses. In response, defendant argued that not only was the evidence admissible, but the fact that the defense already argued in opening statement was reason enough to permit the defenses. Id. at 593-94. The court ruled that the evidence was inadmissible, rejecting "as an extreme form of 'bootstrapping' the defendants' argument that because this purported defense was raised in their counsel's opening argument to the jury without an objection by the government being upheld by the Court, it has necessarily been approved." Id. at 593. The court further rejected the claim that by excluding the evidence, the appellate court would find counsel ineffective for arguing a defense not supported by the evidence. The court stated, "Carried to its logical extreme, [this position] would encourage defense counsel to include clearly inadmissible evidence in their opening arguments because their failure to follow through with supporting evidence would automatically entitle their clients to a new trial and/or post-conviction remedy." Id.

To avoid the issue presented in Kemp, the Government respectfully requests this Court order Defendant Lee to provide advance notice of intent to offer any "good acts" evidence. Absent such notice, the Government respectfully requests that Defendant be barred from referring to specific "good acts" in opening statements and from introducing such evidence.

C. REBUTTING DEFENDANT'S CHARACTER EVIDENCE

"Once the defendant has 'opened the door' by offering evidence as to his good character, the prosecution may rebut that evidence." United States v. Clark, No 00-1743, 2001 WL 1631826 *3 (6th Cir. 2001) (citing United States v. McGuire, 744 F.2d 1197, 1204 (6th Cir. 1984)). The Supreme Court has long cautioned defendants:

> The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. The prosecution may pursue the inquiry with contradictory witnesses to show that damaging rumors, whether or not well-grounded, were afloat–for it is not the man that he is, but the name that he has which is put in issue. Another hazard is that his own witness is subject to cross-examination as to the contends and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion. It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. Thus, while the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by a mere parade of partisans. United States v. Michelson, 335 U.S. 469, 479 (1948).

While the defendant is limited to opinion and reputation testimony to prove character, the prosecution may rebut that evidence through cross-examination of defense witnesses about specific instances of conduct and through testimony of character witnesses. Id. Should Defendant Lee put forth evidence of good character in her defense, the Government intends to rebut such evidence through all means permissible under the Federal Rules of Evidence.

IV. DEFENDANT SHOULD NOT BE PERMITTED TO PRESENT DEFENSES THAT ARE NOT RELEVANT TO GUILT OR INNOCENCE

A. POLITICS AS USUAL DEFENSE

The defense that bribery and corruption is a normal business practice has never been accepted by a court as a legitimate defense and should be precluded in the present case. Rule 401 of the Federal Rules of Evidence allows only the admission of relevant evidence, which requires that the evidence be "of consequence to the determination of the action . . ." Fed. R. Evid. 401.

Here, no such consequence exists for the evidence. In order to put forward this defense, Defendant Lee would first have to fully admit criminal liability, and then introduce evidence of widespread custom and corrupt practices, with no tangible benefit to her defense. As neither custom nor the "politics as usual" defense has found support in the case law of this Court, evidence offered in support should be excluded as irrelevant, and the Government moves for its exclusion accordingly.

Defenses based upon prevailing custom, when they involve violations of criminal statutes, cannot be valid. See Burnett v. United States, 222 F.2d 426, 427 (6th Cir. 1955) (court declined to admit evidence of army custom to make furniture on government time and expense), *United States v. Riley*, 550 F.2d 233, 236 (5th Cir. 1977) ("general practice is not an absolute defense to criminality. . ."), United States v. Brookshire, 514 F.2d 786, 789 (10th Cir. 1975) ("custom and usage involving criminality do not defeat a prosecution for violation of a federal criminal statute"), United States v. Slapo, 285 F. Supp. 513, 513-14 (S.D.N.Y. 1968) ("we have not yet reached the point . . . where an industry custom and practice serves to repeal criminal laws"); United States v. Troutman, 814 F.2d 1428 (10th Cir. 1987) (rejecting that payoffs were just how "business was done" could serve as a defense); United States v. O'Grady, 742 F.2d 682, 700 (2d Cir. 1984) ("That such corruption may be widespread . . . is no more an excuse barring prosecution under the Hobbs Act than . . . the 'custom' followed for many years by American companies of giving money to officials of foreign governments with whom they did business."); United States v. Walsh, 700 F.2d 846, 854 (2d Cir. 1983) (holding attempts to secure fair treatment were still bribes, and illegal under the Hobbs Act); United States v. Fawell, No. 02CR310, 2003 WL 21544239, *8 (N.D. Ill. July 9, 2003) ("Whether the practice was common or uncommon, it was improper and the charged activities were unlawful . . . the argument and evidence that 'everybody does it'. . . [is] no more relevant here than it would be in a drug distribution prosecution.").

As the courts have repeatedly rejected reliance on local custom or cultures of corruption running rampant as a defense to violations of federal criminal statutes, the Court should preclude the offering of irrelevant evidence of an invalid defense in the present case.

B. ABSENCE OF CO-DEFENDANTS FROM TRIAL

An argument that other individuals should be prosecuted but have not been charged is contrary to law, is highly prejudicial and should be precluded under Federal Rules of Evidence 401 and 403. Even assuming arguendo that other individuals have criminal liability, there is no requirement that the Government charge every conspirator at the same time, in the same charging document.

C. MEALS, DRINKS OR OTHER SIMILAR ITEMS CANNOT CONSTITUTE BRIBES

In some public corruption cases, defendants suggest that if a person could "eat it," "drink it," or "watch it," it cannot be a bribe. The case law is clear. It is a crime for a public official to solicit or accept anything of value. Therefore, any argument that a meal, drink or other thing of value cannot be a bribe is irrelevant as a misstatement of law. The Government moves this Court, in limine, to prevent any argument that food, drinks, or other things of value cannot constitute bribes.

V. SUBMITTING THE INDICTMENT TO THE JURY

The Sixth Circuit has held that the trial judge has the discretion to submit the Indictment to the Jury in a criminal case so long as limiting instructions are given to the effect that the Indictment is not to be considered as evidence of the guilt of the accused. United States v. Cooper, 577 F.2d 1079, 1089 (6th Cir. 1978) ("It was not error for the trial judge to have permitted the jury to have a written copy of the indictment, especially where, as here, the jury was fully instructed that it could not consider the indictment as evidence of the crime itself.") Accord United States v. Russo, 480 F.2d 1228, 1244 (6th Cir. 1973).

In the 2013 edition of the Sixth Circuit Pattern Jury Instructions (Criminal), the Sixth Circuit Committee on Pattern Jury Instructions specifically addressed the issue of submitting the Indictment to the jury, either by reading it to the jury or by providing a copy to the jury during their deliberations:

> Reading the indictment to the jury is generally within the discretion of the district court. United States v. Smith, 419 F.3d 521, 530 (6th Cir. 2005), citing United States v. Maselli, 534 F.2d 1197, 1202 (6th Cir. 1976). Instructions stating that "the purpose of an indictment is only to cause the person named therein to be brought to trial and to advise him of the nature of the charge or charges against him" have been characterized as "desirable" and "customary." United States v. Baker, 418 F.2d 851, 853 (6th Cir. 1969). Earlier versions of this commentary did not recommend that the trial judge read the indictment to the jury, and also recommended that the trial judge not paraphrase the indictment. The Committee recognizes that district court practices on reading or summarizing the indictment vary widely, and takes no position on the best practice.
>
> **However, jury confusion can arise, particularly in complex cases, if the indictment is not read, accurately summarized or sent to the jury room**. See, e.g., United States v. Bustamante, 1992 WL 126630, 1992 U.S. App LEXIS 13407 (6th Cir. 1992) (unpublished). As the Eighth Circuit states in Note 2 to its Model Criminal Instruction 1.01 (2003 ed.), **"Depending on the length and complexity of the indictment and the individual practices of each district judge, the indictment may be read, summarized by the court, summarized by the prosecution or not read or summarized depending on what is necessary to assist the jury in understanding the issues before it.**" If the indictment is furnished in writing to the jury, a limiting instruction such as Instruction 1.03(1) must be given. United States v. Smith, 419 F.3d 521, 531 (6th Cir. 2005) (omission of limiting instruction was error but not plain error). The Committee takes no position on the practice in some districts of providing the jury with a copy of the indictment.
>
> Reading the indictment to prospective jurors is not an abuse of discretion if appropriate limiting instructions are given to the effect that the indictment is not to be considered as evidence of guilt. United States

> v. Lawson, 535 F.3d 434, 441 (6th Cir. 2008). Such a limiting instruction is found in Instruction 1.03(1).

Committee Commentary 2.02, Sixth Circuit Pattern Jury Instruction – Criminal (2013) (emphasis added).

Given the expected length of this trial, the nature of the underlying scheme and the manner in which it was carried out—with numerous calls and text messages spread out over months—the Government respectfully requests that the Court submit the Indictment to the jury during deliberations, or alternatively, that the Court read the relevant sections of the Indictment to the jury when providing them the jury instructions. In either case, the Court should issue a limiting instruction that the Indictment is not evidence of Defendant Lee's guilt.

VI. ADMISSIBILITY OF SUMMARY EXHIBITS

In accordance with established practice in the Sixth Circuit and other circuits, the Government intends to use in its case-in-chief summary charts detailing and organizing the Government's evidence, in conjunction with the testimony of FBI Special Agents. See United States v. Bray, 139 F.3d 1104, 1112 (6th Cir. 1998); United States v. Scales, 594 F.2d 558 (6th Cir.), cert. denied, 441 U.S. 946 (1979). So long as the summary charts are properly authenticated, the contents of both the charts and the summary witness' testimony are limited to evidence which is admissible or has been admitted, the use of such charts and witnesses will contribute to an orderly and informed trial and will not prejudice the rights of the defendant.

The use of summary exhibits is permitted by Fed. R. Evid. 1006:

> The contents of voluminous writings, recordings, or photographs may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

In Scales, a leading case on the use of summary charts which has been followed in courts across the country, the Sixth Circuit discussed Rule 1006:

> There is no requirement in Rule 1006, however, that it be literally impossible to examine the underlying records before a summary or charts may be utilized. All that is required for the rule to apply is that the underlying "writings" be "voluminous" and that in-court examination not be convenient.

Id. at 562. In Scales, the court approved the government's use of a series of large summary charts introduced through the testimony of a special agent. The first chart summarized all the charges contained in the indictment, and each of the remaining charts summarized a count or an overt act, or both, by reproducing or making reference to some of the documentary proof already in evidence. The court specifically approved the use of a special agent, who was not an expert witness, to present the charts. Because the agent had properly catalogued the exhibits previously admitted into evidence, had knowledge of the analysis of records referred to in the charts, and had supervised the compilation of the charts, the court held that the agent was the proper person to attest to their authenticity and accuracy.

Other circuits have cited Scales as authority for upholding the admissibility of summary charts and summary testimony, where such summaries assisted the jury in organizing the proof and understanding the charges against the defendant. In United States v. Lemire, 720 F.2d 1327, 1328 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984), the court held that "a non-expert summary witness can help the jury organize and evaluate evidence which is factually complex and fragmentally revealed in the testimony of a multitude of witnesses throughout the trial." The D.C. Circuit specifically rejected the defendant's contentions that a special agent was an improper summary witness because he was not an "expert," and that the summary witness provided an unwarranted second closing argument for the government. In United States v. Jennings, 724 F.2d 436, 443 (5th Cir.), cert. denied, 467 U.S. 1227 (1984), the Fifth Circuit relied upon Scales, in holding that a special agent is qualified to present summary charts which do not contain complicated calculations requiring the need of an expert witness for accuracy.

The Government's proposed use of summary charts and summary witness testimony in this case will, consistent with the above-cited authority, assist the jury as finder of fact in organizing the proof and understanding the charges against Defendant. The summary charts, and the testimony of the summary witness concerning the charts, will be limited to evidence which is admissible or has been admitted and has been made available to the defense for examination and copying.

VII. GOVERNMENT WITNESS TESTIFYING PURSUANT TO PLEA AGREEMENT

The Government is entitled to elicit from witnesses who have plead guilty the contents of their plea agreements for the purpose of allowing the jury to assess credibility. The Government acknowledges that a plea agreement is not substantive evidence of guilt and that a limiting instruction concerning the use of such testimony would be appropriate, if requested by Defendant.

The Sixth Circuit has held that the government may elicit the contents of a plea agreement from a witness on direct examination in anticipation of potential cross-examination and in order to afford the jury a better opportunity to evaluate the witness's credibility. See United States v. Townsend, 796 F.2d 158, 162-63 (6th Cir. 1986); United States v. Walker, 871 F.2d 1298, 1303 (6th Cir. 1989). Such testimony is permissible so long as it is not offered as substantive evidence of the defendant's guilt. Townsend, 796 F.2d at 162; Walker, 871 F.2d at 1303. The Government intends to elicit testimony from some or all of the codefendants regarding each codefendant's understandings of his own plea agreement on direct examination.

VIII. THE JURY SHOULD NOT BE INFORMED OF THE CONSEQUENCES OF ITS VERDICT

If convicted in this case, Defendant Lee faces a possible term of imprisonment, a fine, multiple restitution orders and forfeiture orders. Defendant may endeavor to educate the jury on the potential ramifications of a guilty verdict in this case with the hope of obtaining jury nullification. The Sixth Circuit has firmly rejected such a strategy: "[U]nless juries have roles in sentencing, such as in capital sentencing proceedings, juries should be instructed not to consider defendants' possible sentences during deliberation." United States v. Chesney, 86 F.3d 564, 574 (6th Cir. 1996). See also United States v. Stotts, 176 F.3d 880, 886 (6th Cir. 1999) ("the Supreme Court has held that juries should be instructed not to consider a defendant's possible sentence unless the jury has a specific role in sentencing"). The Supreme Court explained the reasoning behind insulating the jury from possible penalties in a case.

> The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task. Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.

Shannon v. United States, 512 U.S. 573, 579 (1994). Accordingly, Defendant Lee should not be permitted to distract and confuse the jury by inviting the jury to decide the issue of guilt with the knowledge of this Court's sentencing options or the applicable guidelines range.

Defendants often infuse sentencing into the trial under the guise of cross-examining a cooperating witness. For example, a defendant may ask the witness about the maximum penalty for the charged offense, may compare a cooperator's plea agreement to the defendant's status, or use the cooperator to contrast a defendant's perceived situation, i.e., "You pleaded guilty because you didn't want a trial to bankrupt you, cause family strain, etc."

The Government moves this Court, in limine, to prohibit Defendant Lee from eliciting any testimony or making any argument that may directly or indirectly inform the jury of sentencing options or endeavor to engender sympathy for Defendant. In so moving, the Government is not seeking to prohibit Defendant from questioning cooperating witnesses about potential bias from their plea agreements. However, the Government is asking the Court to direct counsel to conduct such examination so as to truly question about bias and not merely inform the jury of the potential sentences Defendant faces.

IX. THE COURT SHOULD PERMIT TWO CASE AGENTS TO REMAIN IN THE COURTROOM DURING TRIAL

The Government moves this Court, in limine, to permit two case agents to remain in the courtroom during trial. The Government anticipates the Court entering a separation of witnesses' order in this case pursuant to Federal Rule of Evidence 615. The Government requests the Court to permit two potential witnesses to remain in the courtroom throughout the trial to assist the Government at counsel table.

Federal Rule of Evidence 615(2) specifically excludes from the sequestration order "an officer or employee of a party which is not a natural person designated as its representative by its attorney." The Government anticipates designating FBI Special Agent Christopher Fassler as the Government's representative present at counsel table.

In addition to requesting S.A. Fassler's presence at trial, the Government requests the Court permit S.A. Michelle Stone to assist at counsel table. The Government anticipates several documentary exhibits, in addition to demonstrative exhibits and extensive electronic evidence. In order to organize, maintain and track the evidence and to present the evidence in a coherent and efficient manner, the Government is requesting a second case agent.

Federal Rule of Evidence 615(3) provides an additional exception to the Court's sequestration order for witnesses "whose presence is shown by a party to be essential to the presentation of the party's cause." See United States v. Mohney, 949 F.2d 1397, 1404-05 (6th

Cir. 1991). The rule, therefore, allows the Government to designate representatives in addition to the case agent for certain prosecutions that are sufficiently complex so that "the aid of more than one law enforcement officer is needed to sort through extensive, technical evidence, and to help 'map out strategy.'" See United States v. Phibbs, 999 F.2d 1053, 1072 (6th Cir. 1993). "The 'essential' witness exception set out in Rule 615(3) 'contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation.'" Id. at 1073 (quoting Advisory Committee Notes to Fed. R. Evid. 615).

X. ESTIMATE OF LENGTH OF JURY TRIAL

The United States believes that the Government's case-in-chief will take approximately seven to ten trial days.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January 2017 a copy of the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system.

/s/ Linda H. Barr
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